Supreme Court, U.S.
FILED
JAN 27 2015
CLERK

Nos. 14-46, 14-47, 14-49

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.
Respondents.

ON WRITS OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF OF PEABODY ENERGY CORP. AS AMICUS CURIAE SUPPORTING PETITIONERS

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RULE 29.6 STATEMENT

Peabody Energy Corp. is a publicly-traded company on the New York Stock Exchange under the symbol "BTU." Peabody Energy Corp. has no parent corporation and no publicly held corporation owns more than 10% of Peabody Energy Corporation's outstanding shares.

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BRIEF OF PEABODY ENERGY CORP. AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE

Peabody Energy Corporation ("Peabody") has a continuing interest in the proper interpretation not only of the Clean Air Act, but of health and safety regulation generally.[1] Peabody is the world's largest private-sector, publicly-traded coal company and the largest producer of coal in the United States. Peabody's products fuel approximately 10 percent of America's and 2 percent of the world's electricity. Peabody also has an ownership interest in a 1,600 megawatt coal-fueled electricity generation plant in the United States.

Peabody seeks to vindicate not only its own interests but the interests of the communities it serves and the consumers who depend on affordable and reliable electricity. Society's interests are best served by a rational system of risk management that considers not merely the benefits of proposed agency action, but also the full scope of economic costs and potential "risk trade-offs" – the danger that policies designed to address *one* risk might inadvertently increase *other* risks. Peabody is in a position to offer helpful guidance to this Court on the need to focus on a global, reasoned,

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[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, counsel for amicus affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief.

and systematic approach to risk regulation, which will result in policies that provide more protection for human health and the environment.

SUMMARY OF ARGUMENT

This Court should clarify a fundamental principle of administrative law: agency action under environmental and other regulatory statutes, including the Clean Air Act, ordinarily does not reflect reasoned decision-making unless the agency adequately considers economic costs and risk trade-offs associated with the agency action. This practice is now commonplace in the majority of agency rule-making. A cost-benefit analysis is the necessary *process* by which an agency arrives at a justifiable *result*, *i.e.*, an outcome that provides a net benefit to society. The alternative — namely, the refusal to consider whether a rule does more harm than good — strips away a procedural safeguard necessary for reasoned decision-making, rendering the agency's decision-making presumptively unreasonable, absent a clear congressional statement to the contrary. Hence, a presumptive duty exists for agencies to consider costs when rulemaking, unless Congress clearly prohibits it.

Moreover, this Court should not confine its decision simply to opining that agencies presumptively must consider "costs" in the abstract, because such a course would leave agencies the option of artificially truncating their analysis by considering only *some* costs and not *all relevant ones*. This danger is real. Agencies often exclude categories of costs, or even whole sectors of the economy, in performing their analyses of the expected impact of a proposed rule, which allows them to arrive at manipulated and

politically driven results.

This case demonstrates the astonishing consequences of an agency's failure to take costs and risk trade-offs into account. In adopting its Utility MATS Rule under Section 112(n)(1)(A) of the Clean Air Act, 42 U.S.C. § 7412(n)(1)(A) (1999), EPA concluded (in a reversal of its previous determination) that costs were not a necessary factor to consider as part of a determination whether a regulation was "appropriate." The upshot of EPA's conclusion is a Rule with estimated costs of $9.6 *billion* annually and estimated annual benefits of a mere $4 to $6 *million*. National Emission Standards for Hazardous Air Pollutants From Coal- and Oil- Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units ("EPA Final Rule"), 77 Fed. Reg. 9,304, 9,306, Table 2 (Feb. 16, 2012); Pet. App. 208a. "Put simply, the Rule is 'among the most expensive rules that EPA has ever promulgated.'" Pet. App. 83a (citation omitted).

Further, even EPA's huge figure of $9.6 billion in costs represents a severe underestimation. The calculation is limited to compliance costs and fails to include the far-reaching systemic costs imposed by the Rule on the U.S. economy. The Rule will cause a significant percentage of power plants to shut down and will also result in job losses, decreased reliability of the electrical grid, and higher prices for electricity and consumer goods. The Agency purports to consider employment impacts, *but only* in the electricity sector. EPA therefore does not consider job losses the Rule

would cause in other sectors or the substantial increases in electricity prices that it would entail.

The massive costs associated with EPA's proposal will cause significant social hardship. For millions of lower-income households, high energy costs force hard decisions about what bills to pay – housing, food, education, health care, or other necessities. Fixed-income seniors are particularly vulnerable to increased energy costs. Energy costs are also highly regressive, and consumer electricity prices correlate strongly with the poverty rate. In fact, inability to pay utility bills is the second leading cause of homelessness in the United States, second only to domestic abuse.

Ironically, the costs of EPA's Rule will lead to the respiratory problems and health problems the agency is seeking to prevent. The costs will almost certainly have a disproportionate impact on the poorest segments of the population, who are at the highest risk for respiratory diseases.

The text of Section 112 and the structure of the Clean Air Act as a whole demonstrate that EPA is required to consider costs and risk trade-offs in its decision. The agency cannot properly determine whether a new regulation is "appropriate" without referring to costs and risk trade-offs.

In addition, under the Administrative Procedure Act, agencies are required to conduct a "reasoned analysis" and provide a reasoned basis for their decisions. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42, 52, 57 (1983). To qualify as "reasoned" under this standard – and thus to survive judicial review under 5 U.S.C. § 706 –

agency action must consider costs and risk trade-offs.

Moreover, general administrative and legislative practice has given rise to a baseline norm or customary practice that agencies should consider costs in their decisions. It is unreasonable for an agency to act inconsistently with that norm, absent a clear congressional directive otherwise. Under the circumstances here, therefore, the proper interpretation of "appropriate" must be informed by the settled customary practice of cost consideration in agency decision-making.

Indeed, a process that would permit an agency to ignore overwhelming net harms to society, and to accept a ratio of 1,500:1 between costs and benefits, is a recipe for abuse and arbitrary decision-making inconsistent with the constitutional presuppositions of our system of government.

The judgment below should be reversed.

ARGUMENT

I. Reasoned Decision-Making Requires Consideration Of Costs And Risk Trade-Offs.

This Court should make clear that there is a strong presumption that agencies are required to give adequate consideration to costs and risk trade-offs in the absence of an express statutory provision to the contrary. Consideration of costs and risk trade-offs is necessary for reasoned decision-making in the absence of an express congressional statement precluding an agency from taking those factors into account.

As Justice Breyer has explained:

> In order better to achieve regulatory goals —

> for example, to allocate resources so that they save more lives or produce a cleaner environment — regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public harm.

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 490 (2001) (concurring opinion); *see also* Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1684 (2001) ("[I]t is most unlikely that the Court would disagree with Justice Breyer.").

Justice Kagan has noted that proceeding with regulations without considering cost is "silly."[2] Justice Powell similarly took the view that it would be "irrational" to attribute to Congress "a standard-setting process that ignored economic considerations," because it "would result in a serious misallocation of resources." *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 670 (1980) (concurring opinion). Justice Powell also recognized in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), that the "shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air

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[2] *EPA, et al. v. EME Homer City Generation, L.P., et al.*, No. 12–1182, 2013 WL 6702694 (U.S.), 13 (U.S. Oral Arg., Dec. 10, 2013):

> [W]hat does it take in a statute to make us say, look, Congress has demanded that the regulation here occur without any attention to costs? In other words, essentially, Congress has demanded that the regulation has occurred in a fundamentally silly way.

quality." *Id.* at 272 (concurring opinion).

Thus, even where a statute does not expressly articulate the factors governing agency action, the agency must fully consider costs in order to engage in reasoned decision-making. For example, in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), this Court affirmed EPA's reliance on cost-benefit analysis in promulgating regulations under a provision of the Clean Water Act requiring "the best technology available for minimizing adverse environmental impact." Even though the statutory section at issue did not expressly refer to "cost," this Court examined "common parlance" and opined that "'best technology' may also describe the technology that *most efficiently* produces some good." *Id.* at 218 (emphasis in original). This Court concluded that Congress' decision not to enumerate "cost" as a factor did not preclude its consideration, because legislative "silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree." *Id.* at 222. Justice Breyer explained in his concurring opinion that consideration of costs (as well as benefits) is central to rational regulatory decision-making because "every real choice requires a decision to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs." *Id.* at 232 (opinion of Breyer, J.). Justice Breyer added that weighing costs and benefits is particularly important "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious)

problems." *Id.* at 233.

Consideration of costs is particularly important in a case like this, where an agency seeks to pursue extraordinarily costly remedies in response to trivial risks. "Put simply, the Rule is 'among the most expensive rules that EPA has ever promulgated.'" Pet. App. 83a (quoting JAMES E. MCCARTHY, CONG. RESEARCH SERV., R42144, EPA'S UTILITY MACT: WILL THE LIGHTS GO OUT?, at 1 (2012)). EPA estimated the cost of the Utility MATS Rule to be $9.6 billion annually, while the estimated benefits are a mere $4 to $6 million using a 3 percent discount rate. EPA Final Rule, 77 Fed. Reg. at 9,306, Table 2; Pet. App. 208a. Using a 7 percent discount rate, these benefits are reduced to $500,000 to $1 million. *Id.* at 9,306.[3]

No rational person would exchange $9.6 billion for a return of $4 to $6 million, and EPA was able to generate this meager benefits estimate only by making a series of outlandish assumptions about exposure to mercury and other substances. For example, EPA assumed that a pregnant woman would consume 13 ounces of locally caught fish every day during her pregnancy and that the mercury levels in the fish would represent some of the highest levels measured in

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[3] EPA claims that, overall, the regulation will create $33-$90 billion in benefits. EPA Final Rule, 77 Fed. Reg. at 9,306; *but see* Pet. App. 208a. But virtually all of this amount consists of what EPA describes as a "co-benefit" of reducing SO2 emissions. *See* Pet. App. 208a. However, because SO2 is not a "hazardous air pollutant" for purposes of Section 112, EPA recognizes that it cannot rely on these asserted co-benefits as part of its determination whether regulation is "appropriate and necessary." EPA Final Rule, 77 Fed. Reg. at 9,320; Pet. App. 268a-272a.

each of the fresh water rivers and lakes for which EPA could find data. National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units ("EPA Proposed Rule"), 76 Fed. Reg. 24,976, 25,007 (May 3, 2011); 77 Fed. Reg. at 9,349; Pet. App. 397a-401, 1299a-1300a. In calculating exposure to non-mercury trace metals, EPA determined the exact location of the highest impact from the emissions for each generating facility and then assumed that a hypothetical individual would remain at that precise spot 24 hours a day, 365 days a year, for 70 years to determine whether the increased cancer risk for that individual would exceed one-in-one-million. EPA Proposed Rule, 76 Fed. Reg. at 25,011-12; Pet. App. 1317a-1323a; 77 Fed. Reg. at 9,357-62; Pet. App. 434a-461a.

Thus, this case is similar to *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990) (Breyer, J.), where the First Circuit affirmed a district court's denial of EPA's proposed remedy for cleaning up soil contaminated with PCBs. EPA sought a remedy that would have reduced PCB concentrations to 20 parts per million ("ppm") rather than 50 ppm, at a marginal cost of $9.3 million. EPA's decision was based on its extraordinary assumptions that (a) developers would build residential housing on the previously undeveloped site, (b) small children, playing in the backyard, would eat dirt containing PCBs, and (c) the children would eat such dirt each day for 245 days per year for three and a half years. *Id.* at 441. The court

of appeals opined that "[o]ne might conclude from the cited portions of the record that this amounts to a very high cost for very little extra safety." *Id.* *See also* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 12 (Harvard Univ. Press 1993) (spending $9.3 million to protect "non-existent dirt-eating children" is the problem of "'the last 10 percent'").

The need to consider costs in regulatory decision-making arises from the finite nature of society's resources. Because allocative choices made in protecting health and the environment do not occur in a vacuum, risk-management decisions made without regard to associated costs are necessarily arbitrary and unreasonable. During the Clinton Administration, the Office of Management and Budget reported to Congress that "the only way we know to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs."[4] Executive orders issued by both the Clinton and Obama Administrations have required agencies to consider costs.[5] Even EPA's own Science Advisory Board has documented the dangers of ignoring costs and risk trade-offs.[6]

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[4] OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS 10 (1997).

[5] *See* Regulatory Planning and Review, Exec. Ord. No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Improving Regulation and Review, Exec. Ord. No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

[6] U.S. EPA SCIENCE ADVISORY BOARD: RELATIVE RISK

As one leading expert in the regulatory process has explained, "[a] rational system of regulation looks not at the magnitude of the risk alone, but assesses the risk in comparison to the costs."[7] "Without some sense of both costs and benefits—both nonmonetized and monetized—regulators will be making a stab in the dark."[8] Professor Sunstein continues:

> [A]ny reasonable judgment will ordinarily be based on some kind of weighing of costs and benefits, not on an inquiry into benefits alone.... If the costs would be high and the benefits low, on what rationale should ... the EPA refuse even to consider the former? There appears to be no good answer. If there is not, the agency's interpretations should be declared unreasonable.[9]

He therefore proposed that courts adopt a rebuttable presumption that refusal to consider costs is unreasonable.[10] This consideration of costs should be both procedural (considering them in the first place) as well as substantive (giving them some weight in the

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REDUCTION STRATEGIES COMMITTEE, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION, (Sept. 1990).

[7] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 493 (1989).

[8] Cass R. Sunstein, *Cost–Benefit Analysis and the Environment*, 115 ETHICS 351, 354 (2005).

[9] Cass R. Sunstein, *Cost–Benefit Default Principles*, 99 MICH. L. REV. 1651, 1694 (2001).

[10] *Id.* at 1693-94.

calculus).[11]

Numerous other scholars have agreed with the need to consider costs:

- John D. Graham: Spending over $15 million to save a life is "statistical murder" and becomes net counterproductive because the wealth loss will translate into an additional death. *Risk Assessment and Cost-Benefit Analysis of New Regulations: Hearing on H.R. 9 Before the House Comm. on Commerce*, 104th Cong. 296 (1995) (statement of John D. Graham, Ph.D.).

- Richard Pierce: "All individuals and institutions naturally and instinctively consider costs in making any important decision.... [I]t is often impossible for a regulatory agency to make a rational decision without considering costs in some way." *The Appropriate Role of Costs in Environmental Regulation*, 54 ADMIN. L. REV. 1237, 1247 (2002).[12]

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[11] *Id.* at 1703-04.

[12] Some scholars have proposed that regulation should be risk-averse under the "precautionary" principle, but in a world in which taking regulatory actions inevitably has costs and trade-offs, the precautionary principle provides no reason to ignore them. *See generally* Stephen Clowney, *Environmental Ethics and Cost-Benefit Analysis*, 18 FORDHAM ENVTL. L. REV. 105 (2006) (arguing that cost-benefit analysis can ultimately produce better environmental outcomes than the precautionary principle); Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003) (criticizing the precautionary principle for causing paralysis because of its incoherence and dependence on cognitive biases); Christopher D. Stone, *Is There a Precautionary Principle?*, 31 ENVTL. L. REP. 10790, 10791 (2001) (noting the

Closely related to the need to consider costs is the need to consider risk trade-offs: "Risks never exist in isolation. They are part of systems. For that reason, any effort to reduce a single risk will have a range of consequences, some of them likely unintended."[13] John Graham and Jonathan Wiener have warned that, "[p]aradoxically, some of the most well-intentioned efforts to reduce identified risks can turn out to increase other risks."[14] One expert has estimated that a more rational prioritization of regulatory policies could save 60,000 lives, with the expenditure of no additional resources.[15]

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incoherence of the principle); Jonathan H. Adler, *More Sorry Than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol*, 35 TEX. INT'L L.J. 173 (2000) (discussing the health-health trade-offs of the precautionary principle, for example, in FDA drug approvals); Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996) (criticizing the precautionary principle as an indeterminate decision rule that can conceal greater risks to public health); BREYER, BREAKING THE VICIOUS CIRCLE, *supra*, at 18, (noting that "err[ing] on the safe side ... can produce random results").

[13] Sunstein, *supra* note 9, at 1653.

[14] John D. Graham and Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, *in* RISK VS. RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1 (John D. Graham & Jonathan Baert Wiener eds., Harvard 1995).

[15] John D. Graham, *Legislative Approaches to Achieving More Protection Against Risk at Less Cost*, 1997 U. CHI. LEGAL F. 13; *see also* Tammy O. Tengs et al., *Five Hundred Life-Saving Programs and Their Cost-Effectiveness*, 15 RISK ANALYSIS 369 (1995); Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, *in* RISKS, COSTS,

For example, "[t]he major policies to control pollution in the United States have been aimed at one target environmental medium (air, water, or land) at a time, with the result that pollution has too often been merely shifted from one medium to another instead of reduced overall."[16] Thus, "the 1977 Clean Air Act requirement that all coal-fired power plants install scrubbers to remove sulfur dioxide from their smokestacks has generated tons of toxic sludge that must be disposed of elsewhere."[17] Reducing tropospheric ozone with clean air rules increases skin cancer, due to ozone's beneficial blocking effect on ultraviolet-B (UV-B) radiation, because tropospheric ozone is more effective than stratospheric ozone at blocking UV-B radiation.[18] Similarly, cleanup of

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AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION 167, 172 (Robert W. Hahn, ed. 1996). *See also* Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996).

[16] Graham and Wiener, *supra* note 14, at 13.

[17] *Id.*

[18] Paul J. Crutzen, *Ultraviolet on the Increase*, 356 NATURE 104 (1992) ("Ozone in the troposphere, an industrial pollutant, is (molecule for molecule) a stronger absorber of ultraviolet than ozone in the stratosphere"); *see generally* Ignacio Galindo *et al.*, *Ultraviolet Irradiance over Mexico City*, 45 AIR & WASTE MGMT. ASS'N 886 (1995); NATIONAL RESEARCH COUNCIL, RETHINKING THE OZONE PROBLEM IN URBAN AND REGIONAL AIR POLLUTION 110 (National Academy Press 1991); G. Seckmeyer & R.L. McKenzie, *Increased Ultraviolet Radiation in New Zealand (45 [degrees] S) Relative to Germany (48 [degrees] N)*, 359 NATURE 135 (1992); John E. Frederick *et al.*, *Empirical Studies of Tropospheric Transmission in the Ultraviolet: Broadband Measurements*, 32 J. APPLIED METEOROLOGY AND CLIMATOLOGY 1883 (1993).

hazardous waste sites creates increased risk of accidental fatalities, especially in construction and transportation jobs. For a typical site, the accident fatality risk from a cleanup appears to be several times larger than the health risk from not cleaning up.[19] Another example is drinking water chlorination. U.S. risk assessments classifying the chlorination process as carcinogenic led Peru to suspend it, triggering the largest outbreak of cholera in recent times, in which over 800,000 people became ill and nearly 7,000 died.[20]

Risk trade-offs are pervasive, and no rational system of regulation would favor taking actions aimed at a single risk if they result in even greater countervailing risks. Nor would a rational system ignore costs in regulatory decisions.

II. An Agency's Duty Includes The Obligation To Give Adequate Consideration To The *Full Scope* Of Costs And Risk Trade-Offs.

This Court should make clear that an agency's duty to consider costs is not satisfied by its decision simply to consider *some costs*, or the subset of costs it *prefers* to consider. Rather, the agency is required to consider *all relevant costs*. This Court should not confine its decision simply to opining that agencies must consider "costs" in the abstract, because such a course would leave agencies the option of artificially truncating their

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[19] Alan F. Hoskin *et al.*, *Estimated Risk of Occupational Fatalities Associated With Hazardous Waste Site Remediation*, 14 RISK ANALYSIS 1011 (1994).

[20] Christopher Anderson, *Cholera Epidemic Tied to Risk Miscalculation*, 354 NATURE 255 (1991).

analysis by considering only *some* costs and not *all relevant ones.*

For example, in this case EPA acknowledged that it performed an evaluation of some costs in its Regulatory Impact Analysis (RIA), but admits that it intentionally ignored the RIA in determining whether regulating EGUs is "appropriate" under Section 112. Even if EPA had considered the RIA, its cost evaluation was wholly inadequate. In the RIA, EPA limited its consideration of costs to those arising directly in the utility sector – and arbitrarily to exclude even readily measurable economy-wide employment effects and other impacts caused by increased electricity prices. EPA's cost estimate of $9.6 billion for the Utility MATS Rule is confined to estimated compliance costs, EPA Final Rule, 77 Fed. Reg. at 9,306, 9,425, not a full analysis of the Rule's economic impact. But the evidence indicates that the economic effect of the Rule will be much broader than EPA's "cost" analysis would indicate. The Rule will cause the shut-down of coal-fired plants, reduce electric reliability, and increase retail electricity prices. These economic burdens will be imposed on consumers of electricity, including businesses, and will ultimately translate into higher costs for consumer goods and services and reduced employment. EPA did not take any of these "ripple" effects into account, even though it recognized that the Utility MATS Rule "is likely to have a significant adverse effect on the supply, distribution, or use of energy," *id.* at 9,441, and estimated that the Rule will increase the average nationwide retail electricity prices by 3.1 percent in 2015. *Id.* at 9,425. Other studies put the estimated

price increase much higher, at 12-24 percent.[21] Federal officials have warned that the Rule threatens the reliability of the electrical grid by causing plants to shut down.[22]

Further, EPA conducted only a limited analysis of the employment impact of its Utility MATS Rule in the electricity sector, finding a net increase of 8,000 jobs due to compliance activities. EPA Final Rule, 77 Fed. Reg. at 9,425. EPA ignores the loss of jobs caused by higher electricity prices and reduced business competitiveness. Other assessments show job losses in the range of 180,000-215,000 in 2015 alone and 50,000-85,000 in later years.[23] Thus, EPA's failure to consider the full scope of the economic costs associated with its

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[21] *See* NDP CONSULTING, A CRITICAL REVIEW OF THE BENEFITS AND COSTS OF EPA REGULATIONS ON THE U.S. ECONOMY 16 (2012), *available at* http://documents.nam.org/ERP/ NAM_PHAM.pdf.

[22] Commissioner Moeller of the Federal Energy Regulatory Commission has warned of the reliability implications of the Utility MATS Rule, cautioning that "reliability is as much a necessity for the EPA as it is for the American people." *Hearing on FERC Perspective: Questions Concerning EPA's Proposed Clean Power Plan and other Grid Reliability Challenges, Before the House Committee on Energy and Commerce Subcommittee on Energy and Power*, at 9 (July 29, 2014) (Written Testimony of FERC Commissioner Philip D. Moeller), *available at* http://www.ferc.gov/CalendarFiles/20140729091755-Moeller-07-29-2014.pdf.

[23] *See* U.S. CHAMBER OF COMMERCE AND NERA ECONOMIC CONSULTING, ESTIMATING EMPLOYMENT IMPACTS OF REGULATIONS: A REVIEW OF EPA'S METHODS FOR ITS AIR RULES 29 (Feb. 2013), *available at* http://www.nera.com/67_8015.htm.

proposal has caused it to dramatically underestimate those costs.

It is all too easy for people with a humanistic bent and with disdain for the "dismal science" of economics to equate hard-headed cost-benefit analysis with an obsession with allocative efficiency and a disregard for distributive justice. But that equation would be profoundly misguided. This case illustrates the point dramatically, for the burden of higher electricity rates falls especially hard on low-income Americans, who already devote substantial portions of their income to basics like heating and cooling. Households with pre-tax incomes less than $50,000 (49% of American households) devote 20% of their after-tax budget to energy costs.[24] For households with less than $30,000 in pre-tax income (consisting of 37 million families), energy costs represent 26% of their post-tax expenditures.[25] This fact is all the more alarming in light of the fact that household incomes for the less well-off segments of the population are still below their pre-recession levels.[26] For millions of households – especially the unemployed, single parents, and those at the bottom of socio-economic ladder – high energy costs force painful decisions about which bills to pay: housing, food, education, health care, and other necessities. Fixed-income seniors are also particularly

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[24] *See generally* AMERICAN COALITION FOR CLEAN COAL ENERGY, ENERGY COST IMPACTS ON AMERICAN FAMILIES, 2001-2014 (Feb.2014), *available at* http://www.americaspower.org/sites/default/files/Energy_Cost_Impacts_2012_FINAL.pdf.

[25] *Id.*

[26] *Id.*

vulnerable to increased energy costs.[27] Energy costs are highly regressive, since energy expenditures consume larger shares of the budgets of low-income families than they do for those of higher-income families. It is no surprise that consumer electricity prices correlate strongly with the poverty rate; in fact, inability to pay utility bills is the second leading cause of homelessness in the United States, lagging behind only domestic abuse.[28]

High energy prices also lead directly to higher mortality rates. The director of a British charity for the aged has commented that "[c]old homes – caused by a number of factors including high energy costs – have a devastating impact on older people's health, and are a major cause of excess winter deaths."[29] Another report found that "[t]housands of people die each winter in the UK as a result of being unable to heat their homes."[30] "And not being able to heat your home

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[27] *Id.* at 12.

[28] THE AFFORDABLE POWER ALLIANCE, POTENTIAL IMPACT OF THE EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES 8 (March 2010), *available at* http://www.misi-net.com/publications/APA-0310.pdf; Roger Bezdek, *Maximum Burden: The Electricity Price Increases From the Proposed EPA Utility MACT Will Act as a Regressive Tax on the Elderly*, PUB. UTILS. FORTNIGHTLY (Dec. 2012); Roger Bezdek, *Florida Will be Hit Hard by MACT*, MODERN POWER SYSTEMS, 15-16 (Sept. 2012).

[29] Simon Read, *Energy Prices Climb as Fuel Poverty Soars*, THE INDEPENDENT (Dec. 21, 2012), *available at* http://www.independent.co.uk/money/spend-save/energy-prices-climb-as-fuel-poverty-soars-8429468.html.

[30] Lucy Jolin, *The Scandal of Britain's Fuel Poverty Deaths*, THE GUARDIAN (Sept. 11, 2014), *available at*

also takes a huge toll on health in general: those in fuel poverty have higher incidences of asthma, bronchitis, heart and lung disease, kidney disease and mental health problems."[31]

Hence, the effects of higher energy costs are felt most acutely by the poor and other segments of the population at highest risk for the health problems targeted by EPA. The Institute for Research on Poverty at the University of Wisconsin has summarized the available research: "Health in the United States is very strongly correlated with income. Poor people are less healthy than those who are better off, whether the benchmark is mortality, the prevalence of acute or chronic diseases, or mental health."[32] Ironically, the costs of EPA's Rule mean that it may aggravate the very respiratory illnesses it seeks

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http://www.theguardian.com/big-energy-debate/2014/sep/11/fuel-poverty-scandal-winter-deaths.

[31] *Id.*; *see also* ASSOCIATION FOR THE CONSERVATION OF ENERGY, FACT-FILE: THE COLD MAN OF EUROPE 2, 10, Appendix V, *available at* http://www.ukace.org/wp-content/uploads/2013/03/ACE-and-EBR-fact-file-2013-03-Cold-man-of-Europe.pdf (discussing the link between increased heating costs and excess winter deaths, as supported by data across European Union countries); WORLD WILDLIFE FUND, ENERGY POVERTY RISES IN SPAIN (Apr. 3, 2014), *available at* http://www.wwf.gr/crisis-watch/crisis-watch/energy-climate/10-energy-climate/energy-poverty-rises-in-spain (discussing energy poverty in Spain, and specifically that there are "7 million people who live in unhealthy conditions of homes that are very cold in the winter").

[32] University of Wisconsin-Madison Institute for Research on Poverty, "Health & Poverty," http://www.irp.wisc.edu/research/health.htm.

to prevent, because poverty is highly correlated with the incidence of those diseases.[33] The American Thoracic Society has opined that "poverty may be the number one risk factor for asthma."[34]

In short, by focusing solely on compliance costs, EPA irrationally excludes the far-reaching and at least as significant systemic costs imposed by the Rule on the U.S. economy. EPA ignores the vital importance of reliable and affordable electricity to consumers. It fails to undertake a proper jobs and employment analysis. The Agency purports to consider employment impacts, *but only* in the electricity sector. EPA therefore does not consider job losses in other sectors due to the Rule and the substantial increases in electricity prices that it will entail.

The regulatory costs that EPA seeks to ignore are not simply a matter of concern to the industry within the agency's cross-hairs. These costs have substantial negative impacts on public health and welfare. Judge Easterbrook has cautioned, "[h]igher income is associated with better nutrition and medical care; regulations creating costs exceeding $7.5 million per life (directly) saved may well yield greater indirect loss of life." *Monsanto Co. v. EPA*, 19 F.3d 1201, 1210 (7th Cir. 1994) (dissenting opinion) (citing BREYER, BREAKING THE VICIOUS CYCLE, at 23, *supra*); *see also Int'l Union, UAW v. OSHA*, 938 F.2d 1310, 1326 (D.C.

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[33] *See* Susan E. Dudley, *Economic Impact Analyses*, 16 PACE ENVTL. L. REV. 81, 84-86 (1998); Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare*, 17 INT'L J. OF RISK ANALYSIS 403 (Aug. 1997).

[34] Dudley, *supra* note 31, at 84-85.

Cir. 1991) (Williams, J., concurring) (explaining that recent studies predict that "each $7.5 million of costs generated by regulation may . . induce one fatality" in the public through reduced availability of resources for medical care and safety).

Regulatory actions increasing the price of electricity will lead to unemployment, reduced business competitiveness, and hardship for consumers. Studies have found that a 10 percent increase in electricity prices will result in a one percent reduction in GDP and employment levels.[35]

Thus, EPA's failure to include the Rule's far-reaching systemic effects severely understates not only its net aggregate costs but the manifest unfairness of the way those costs are distributed across society. This case is not an aberration. EPA's policies predictably ensure that its regulations are not analyzed against the full scope of their societal impact. EPA's own written guidelines for cost-benefit analyses admit that no independent examination of employment impacts is regularly conducted:

> At times of recession, questions arise about whether jobs lost as a result of a regulation should be counted as an additional cost of the regulation. However, *counting the number of jobs lost (or gained) as a result of a regulation*

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[35] *See* AMERICAN COALITION FOR CLEAN COAL ELECTRICITY, THE SOCIAL COSTS OF CARBON? NO, THE SOCIAL BENEFITS OF CARBON, Appendix III, at 175-181 (Jan. 2014), *available at* http://www.americaspower.org/sites/default/files/Social_Cost_of_Carbon.pdf.

> *generally has no meaning in the context of BCA [cost-benefit analysis] as these are typically categorized as transitional job losses.*[36]

These Guidelines note that job losses should only rarely be considered in the rulemaking process: "In *very rare cases* in which a regulation contributes additional job losses to a sector exhibiting structural unemployment, analysts should consider including job losses as a separate cost category."[37] EPA has historically considered employment impacts to be generally irrelevant and optional:

> The [Economic Analysis Guideline's] chapters on benefits (Chapter 7) and costs (Chapter 8) point out that regulatory-induced employment impacts are *not*, in general, relevant for a BCA. For most situations, employment impacts should *not* be included in the formal BCA [cost-benefit analysis]. However, if desired the analyst can assess the employment impacts of a regulation as part of an EIA.[38]

And EPA's record bears this out. In one review of EPA's methods for estimating employment impacts

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[36] NAT'L CTR. FOR ENVTL. ECON., OFFICE OF POLICY, U.S. ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES § 8.1.4 (Dec. 17, 2010, last updated May 2014) ("*Economic Analyses Guidelines*") (emphasis added), *available at* http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/ $file/EE-0568-50.pdf.

[37] *Id.* § 8.1.4 n.16 (emphasis added).

[38] *Id.* at § 9.2.3.3 (emphasis added; footnote omitted).

related to air quality regulations, economic research firm NERA found that:

> EPA discussed the employment impacts of proposed air quality regulations in *only 11 of the 48* rulemakings over the 1995 through 2010 period. After 2010 (since the issuance of Executive Order 13563), EPA discussed employment impacts in 7 of 9 rulemakings.[39]

But it is not plausible to assume that workers displaced from jobs because of EPA regulations will readily be able to find alternative employment.[40] That supposition is highly problematic. A recent Displaced Worker Survey by the Bureau of Labor Statistics found that, among the 4.3 million long-tenured displaced workers who lost their jobs between 2011 and 2013,

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[39] *Overview: Summary Results of the Study*, in U.S. CHAMBER OF COMMERCE, IMPACTS OF REGULATIONS ON EMPLOYMENT: EXAMINING EPA'S OFT-REPEATED CLAIMS THAT REGULATIONS CREATE JOBS, *available at* https://www.uschamber.com/sites/default/files/documents/files/020360_ETRA_Briefing_NERA_Study_final.pdf (emphasis added) (last visited on Jan. 26, 2015).

[40] EPA has stated that it need not consider job losses because job loss will be temporary. As stated in EPA's *Guidelines*,

> counting the number of jobs lost (or gained) as a result of a regulation generally has no meaning in the context of BCA as *these are typically categorized as transitional job losses*.... The social cost of a regulation already includes the value of lost output associated with the reallocation of resources (including labor) away from production of output and towards pollution abatement.

U.S. ENVTL. PROT. AGENCY, *Economic Analyses Guidelines*, *supra* note 33, § 8.1.4 (footnote omitted; emphasis added).

39% were still unemployed.[41] And among long-tenured workers who were displaced from full-time wage and salary jobs and were reemployed in such jobs in January 2014, nearly half (or 48%) had earnings that were lower than those of their lost job.[42]

Accordingly, this Court should not limit its decision to a general statement that agencies have a duty to consider "costs" in the abstract. Rather, this Court should make clear that agencies have a responsibility to consider *all* relevant costs unless Congress directs otherwise. In the absence of such a prescription, there is nothing to stop agencies from gaming the system by cherry-picking which costs to include and which to exclude, artificially truncating their analysis to consider only *some* costs rather than *all* relevant ones.

III. Many Reasons Grounded In Legal Principle Require An Agency To Consider Costs And Risk Trade-Offs.

The requirement to consider costs and risk trade-offs is grounded both in organic regulatory statutes (such as the Clean Air Act) and in broader principles of administrative law. General legislative and administrative practice has given rise to a custom or norm that agencies should consider costs in their decisions. Accordingly, absent a clear directive from Congress otherwise, this Court ought to presume that an agency is obliged to do so.

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[41] U.S. BUREAU OF LABOR STATISTICS, WORKER DISPLACEMENT: 2011-2013 (Aug. 26, 2014), *available at* http://www.bls.gov/news.release/disp.htm.

[42] *Id.*

This Court has instructed that, "[e]ven under *Chevron's* deferential framework, agencies must operate 'within the bounds of reasonable interpretation'" and must give meaning to "both 'the specific context in which ... language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citations omitted). The need to consider costs and risk trade-offs is part of the broader context of any rational regulatory scheme.

Thus, in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), this Court reversed a D.C. Circuit decision holding that the "Good Neighbor Provision" of the Clean Air Act did not permit consideration of costs. This Court opined that the D.C. Circuit's construction of the provision at issue would result in "costly overregulation unnecessary to, indeed in conflict with, the Good Neighbor Provision's goal of attainment." *Id.* at 1605. The Court agreed with EPA that using costs in the calculus "also makes good sense," finding it created "an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address." *Id.* at 1607.

Indeed, a process that would permit an agency to ignore overwhelming net harms to society, and to accept a ratio of 1,500:1 between costs and benefits, is a recipe for abuse and arbitrary decision-making. *Cf. Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415, 430-31 (1994) (absence of traditional procedural safeguards against arbitrary and abusive decision-making violates due process guarantees). Such a process would raise serious questions of what might be called "structural due process" by vesting undue discretion in an

unelected agency to make fundamental policy choices – and to avoid political accountability for doing so. *See, e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (invalidating Civil Service Commission regulation denying federal employment to non-citizens because, even though agency was not found to have acted beyond its statutory mandate, decision to bar aliens from federal employment was not a decision that administrative officials were competent to make); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341-42 (1974) (opining that "constitutional problems" would arise if statute were construed as vesting administrative agency with the discretionary authority to impose a tax); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) (stressing the need in constitutional adjudication to focus on the *procedure* of lawmaking as well as the *substantive* limits on the legislative power).

A. The Clean Air Act Requires Consideration Of Costs And Risk Trade-Offs.

The Clean Air Act provides clear indications that implementing regulations should not ignore costs. The particular statutory section at issue here – Section 112 of the Clean Air Act – requires EPA to determine whether a rule is "appropriate and necessary after considering the results of the [agency's] study" of the hazards to public health and after reporting available control strategies to Congress. 42 U.S.C. § 7412(n)(1)(A).

Settled practice indicates that EPA should (and customarily does) consider costs in determining whether significant new regulations are "appropriate and necessary." In fact, EPA has previously considered

costs under Section 112, and courts have affirmed that consideration.[43] In 2005, EPA opined that "[n]othing precludes EPA from considering costs in assessing whether regulation of Utility Units under section 112 is appropriate in light of all the facts and circumstances presented." Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, 70 Fed. Reg. 15,994, 16,001 n.19 (Mar. 29, 2005).

Further, this Court has approved consideration of cost in determining whether a rule is "appropriate." In *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490 (1981), this Court refused to interpret the Occupational Health and Safety Act as requiring absolute safety. To the contrary, this Court recognized that "any standard that was not economically or technologically feasible would *a fortiori* not be 'reasonably necessary or *appropriate*' under [OSHA]." *Id.* at 513 n.31 (second emphasis added). In upholding the OSHA cotton dust standard, this Court noted that "OSHA presented a 'responsible prediction' of what its Standard would cost and its impact on 'production, employment, competition, and prices.'" *Id.* at 530 n.55.

In contrast, EPA would treat the term "appropriate" as imposing no constraint at all on its discretion with

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[43] *See Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 673-74 (D.C. Cir. 2013) (consideration of costs in revising emissions standards under 42 U.S.C. § 7412(d)(6)); *Natural Res. Def. Council v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008) (consideration of costs in setting residual risk standards to protect public health with an ample margin of safety under 42 U.S.C. § 7412(f)(2)(B)).

respect to its consideration of costs. Such a construction would render superfluous the word "appropriate." Moreover, it would ignore the broader custom under which agencies consider costs and risk trade-offs, absent a specific directive otherwise by Congress.

Other provisions of the Clean Air Act confirm the need to consider costs. When Section 112 is read in the context of other related provisions, construing "appropriate and necessary" consistent with the custom of cost consideration harmonizes Section 112 with the whole. The Act states that it seeks to promote public welfare and this country's productive capacity. 42 U.S.C. § 7401(b)(1). A "primary goal" of the Act is to "encourage or otherwise promote *reasonable* Federal, State, and local governmental actions" for pollution prevention. *Id.* § 7401(c) (emphasis added). The term "reasonable" obviously connotes consideration of costs. This is so in this context because if a regulation is not worth the costs, then it, by definition, lacks "reason" for its promulgation. Both administrative law and constitutional law require transparency with respect to what an agency counts as meaningful for setting standards – especially for standards as far-reaching as those at issue, which threaten to shut down entire businesses and put people out of work. The constitutional value of public accountability is at stake.

B. The Clean Air Act Mandates Economic Impact And Employment Analyses.

EPA states that it "perform[s] detailed regulatory impact analyses (RIAs) for each major rule it issues, including cost-benefit analysis, various types of

economic impacts analysis, and analysis of any significant small business impacts."[44] That statement represents the EPA's purported compliance with Section 321(a) of the Act 42 U.S.C. § 7621(a), which expressly mandates that EPA conduct continuing evaluations of how employment is affected by its actions under the Act. With the title "Continuous evaluation of potential loss or shifts of employment," § 321(a) provides:

> The Administrator *shall conduct continuing evaluations* of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

42 U.S.C. § 7621(a) (emphasis added). The Committee Report accompanying this provision noted concern about "the extent to which the Clean Air Act or other factors [were] responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities." H.R. REP. NO. 95–294, at 316 (1977). The Report observed that "a healthful environment, energy conservation, and a

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[44] ENV'T & PUBLIC WORKS COMMITTEE, U.S. HOUSE OF REPRESENTATIVES, QUESTIONS FOR THE RECORD FROM SENATOR DAVID VITTER, GINA MCCARTHY CONFIRMATION HEARING 17-18, *available at* http://www.epw.senate.gov/public/index.cfm?fuseaction=files.view&filestore_id=9a1465d3-1490-4788-95d0-7d178b3dc320.

sound economy are interrelated factors bearing on the quality of life of the Nation." *Id.* at 61. Accordingly, the Report explained that Section 321(a) was meant to ensure that EPA considered the economic effects of its actions:

> Under this provision, the Administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the [CAA]. This evaluation is to include investigations of threatened plant closures or reductions in employment allegedly due to requirements of the act or any actual closures or reductions which are alleged to have occurred because of such requirements.

Id. at 317. Thus, not only must "appropriate" be read in the context of Section 321's requirements for cost considerations but Congress also requires EPA to undertake evaluations of potential loss or shifts of employment resulting from the Act on a "continuing" basis in its regulatory actions. Section 321 not only requires cost considerations but far broader cost considerations than those EPA first considered in its RIA analysis then ignored entirely.

C. Principles Of Administrative Law Mandate Consideration Of Costs And Risk Trade-Offs.

Even apart from the Clean Air Act and other statutes, generally applicable principles of administrative law ordinarily compel an agency to consider cost as a factor in its decisions. The Administrative Procedure Act authorizes reviewing courts to set aside agency action that is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[45] This Court has held that agencies must conduct a "reasoned analysis" and furnish a "reasoned basis" for their decisions. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42, 52, 57 (1983). To qualify as "reasoned" under this standard, and hence to survive judicial review, agency action must consider costs and risk trade-offs. "[C]ost-benefit analysis entails only a systematic weighing of pros and cons, or what Benjamin Franklin referred to as a 'moral or prudential algebra.'" *United Auto Workers v. OSHA*, 938 F.2d 1310, 1321 (D.C. Cir. 1991); *see also Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1221 (5th Cir. 1991) (EPA's refusal to consider the risk of substitutes "deprives its order of a reasonable basis" because "EPA cannot say with any assurance that its regulation will increase workplace safety when it refuses to evaluate the harm that will result from the increased use of substitute products"); *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992) (holding that the National Highway Traffic Safety Administration's automobile fuel efficiency rulemaking was not "reasoned" when the agency focused on the environmental risks of excessive fuel use but failed to consider the countervailing risks posed by smaller and less crash-worthy vehicles).

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[45] The Clean Air Act reiterates that a reviewing court may reverse any action of the EPA that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Section 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A).

D. The Common Law Frequently Involves Consideration Of Costs And Risk Trade-Offs.

Finally, the need to consider costs and risk trade-offs is deeply embedded in the common law as well. The standard of "reasonableness" in tort law requires a court to consider the costs of safety precautions as well as their expected benefits. *See U. S. v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.). The common-law doctrine of "nuisance" also entails a balancing inquiry and a consideration of cost. *See* RESTATEMENT (SECOND) OF TORTS §§ 826-28 (1979). These principles are salient here. In *Forester v. Consumer Prod. Safety Comm.*, 559 F.2d 774 (D.C. Cir. 1977), for example, the court of appeals defined "unreasonable risk" in the Federal Hazardous Substances Act, 15 U.S.C. § 1261(s), as involving "a balancing test like that familiar in tort law: "The regulation may issue if the severity of the injury that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation itself imposes upon manufacturers and consumers." *Id.* at 789 (footnote omitted).

Thus the need to give full and fair consideration to costs and to risk trade-offs is widely recognized throughout our law and our legal tradition, both judicial and statutory, as a foundational basis for creating duties. This well-settled legal foundation demonstrates a strong presumption that agencies are required to give adequate consideration to the full range of costs and risk trade-offs in the absence of an express statutory provision otherwise.

E. The Panel's Reliance On The "Negative Implication" Canon Was Misplaced.

Notwithstanding the acknowledged "centrality" of cost consideration in agency rule-making (Pet. App. 78a-79a) (considering costs is a "central and well established part of the regulatory decision-making process"), the D.C. Circuit Panel did not construe "appropriate" as informed by the customary agency practice of considering costs in proceeding to regulate source categories. Rather, the Panel essentially applied the negative implication canon of construction, that the expression of one thing implies the exclusion of others ("*expressio unius est exclusion alterius*"). *Id.* at 24a-25a.

The Panel erred for two primary reasons: (1) this is not the kind of situation in which the negative implication canon is particularly instructive, and (2) the more helpful interpretive guideline is to construe "appropriate" as being informed by the presumptive duty to consider costs absent explicit congressional intent to the contrary. Unlike the situation in which a clear comparison can be drawn between an explicit statute and a silent one with respect to a standard of conduct (so that the meaning of the silence is clear), this case involves the opposite situation. For example, where a statutory duty is applicable to one class of parties but not to others, the statutory silence with respect to the other classes is properly construed as an intent not to regulate those other classes. The comparison between what is express versus silent is specific and direct.

Not so here. This case concerns the widespread and multi-faceted practice of cost consideration in agency

decision-making, and the negative implication canon is inapplicable. Here, Congress used the term "appropriate" in Section 112, and well-settled law and administrative practice shows that the word "appropriate" already incorporates the concept of "cost." Congress did not need to use the word "cost" explicitly. Further, it assumes too much to contend that Congress must have intended to suspend the general customary practice of cost consideration, merely because the Clean Air Act expressly refers to "costs" elsewhere and does not refer to them in exactly the same explicit terms in the portion of Section 112 at issue here. Against the prevalent cost consideration backdrop, the failure to explicitly refer to "costs" cannot be read as an intended exclusion, particularly in light of the use of the term "appropriate."

Rather, the more instructive guideline is where cost consideration has become the functional equivalent of "standard operating procedure," then it is far more reasonable to assume Congress would not have intended for an agency to ignore costs entirely unless it said so expressly. This guideline is similar to the canon against construing statutes in derogation of the common law. It simply is presumptively invalid to interpret a statute in derogation of the customary administrative practice of cost consideration unless Congress explicitly suspends that well established practice.

Thus, reading the "silence" or construing the ambiguity in this context is not a license to leap to the erroneous conclusion that an agency, to which the relevant statute entrusts decision-making power, may ignore altogether the vital question whether its

proposal would hurt more than it helps. That simply is a bridge too far.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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January 27, 2015